Date: 20020122
Docket: CAC 172153

NOVA SCOTIA COURT OF APPEAL
[Cite as: R. v. Murrins, 2002 NSCA 12]

Bateman, Chipman and Flinn, JJ.A.

BETWEEN:

DAMIAN MURRINS

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel:	Roger A. Burrill and Brad G. Sarson for the appellant Peter Rosinski for the respondent
Appeal Heard:	December 6, 2001
Judgment Delivered:	January 22, 2002
THE COURT:	Appeal on constitutionality of s. 487.052 of the **Criminal Code** is dismissed, the order of the trial judge is set aside and the Crown's application for a DNA order is remitted to Provincial Court for hearing by another judge per reasons for judgment of Bateman, J.A.; Chipman and Flinn, JJ.A. concurring.

BATEMAN, J.A.:

[1] This is an appeal by Damian Murrins from an order of Judge Hughes Randall of the Provincial Court of Nova Scotia, requiring him to provide a DNA sample pursuant to s. 487.052 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 (the "**Code**").

BACKGROUND:

[2] In the early morning hours of May 9, 1999 police were called to the area of Grafton and Blowers Streets in Halifax, an area known locally as “pizza corner”. Kevin Higgins, the victim, was found lying bloodied in the middle of the street. The appellant, Damian Murrins, was laying on the sidewalk. He had been restrained by off duty police officers at the scene.

[3] According to the victim, he was standing on a corner eating a submarine sandwich when someone in the crowd made a comment to Mr. Murrins about his dog. Mr. Murrins was not known to the victim. Mr. Murrins, together with another individual, crossed the street proceeding towards Mr. Higgins and the crowd of people nearby his location. The individual with Mr. Murrins threw a bicycle frame in Mr. Higgins’ direction. It did not touch him. Following this Mr. Murrins hit Mr. Higgins on the side of the head with what was later determined to be a hammer. Mr. Higgins attempted to punch Mr. Murrins but was again hit on the head with the hammer. Mr. Murrins hit Mr. Higgins on the head with the hammer at least three times and kicked him repeatedly, some of the hammer blows and kicks occurring even after Mr. Higgins had fallen to the ground. Unconscious, Mr. Higgins was taken to hospital. He received 10 staples and 13 stitches to his head, as well as 3 stitches above his eye. He is left with some scarring, had a cracked tooth, missed two days work and still suffers from occasional dizziness. According to witnesses Mr. Murrins' aggression followed an altercation between him and others. The victim was not involved in that event.

[4] Mr. Murrins pled guilty to aggravated assault, contrary to s. 268 of the **Criminal Code**. Giving effect to a joint recommendation by the Crown and defence, the Court ordered that he serve two years in custody with a 10-year firearm prohibition. The Crown applied for a DNA order, pursuant to s. 487.052 of the **Code**.

ISSUES:

[5] The appellant has raised the following issues:

> Is s.487.052 of the **Criminal Code** contrary to Section 7 of the **Charter** and therefore of no force and effect pursuant to Section 52(1) of the **Charter**?

Is s.487.052 of the **Criminal Code** contrary to Section 11(i) of the **Charter** and therefore of no force and effect pursuant to Section 52(1) of the **Charter**?

Did the Learned Provincial Court Judge err in law by failing to properly consider the mandatory criteria as outlined in Section 487.052 of the **Criminal Code** in ordering the taking of a bodily substance for the purpose of forensic DNA analysis?

PROCEDURE AND STANDARD OF REVIEW:

[6] Section 487.04 of the **Criminal Code** provides that either party may appeal a decision made pursuant to s. 487.051(1) or 487.052(1) but does not specify the route. The parties to this appeal agreed that an appeal of this decision, being one in relation to an indictable offence, should lie to this court of appeal, pursuant to Part XXI of the **Code**.

[7] On both the constitutional issue and the failure to give reasons, the standard of review is correctness. Absent error in principle, the discretionary decision on the merits to grant or deny the DNA order is entitled to deference (**R. v. Shropshire**, [1995] 4 S.C.R. 227).

ANALYSIS:

[8] At trial the appellant challenged the legislation pursuant to both ss. 7 and 8 of the **Canadian Charter of Rights and Freedoms**, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 (the "**Charter"**). The judge ruled that any **Charter** considerations in relation to the validity of s. 487.052 were fully captured in a s. 8 analysis and that there remained no room for scrutiny within s. 7. In finding that the impugned section did not violate s. 8 of the **Charter** (the right to be secure from unreasonable search and seizure), the judge agreed with the decision of the Ontario Court of Appeal in **R. v. Briggs** (2001), 157 C.C.C. (3d) 38; O.J. No. 3339 (Q.L.), discussed below. Mr. Murrins does <u>not</u> appeal the judge's finding that the legislation is not violative of s. 8 of the **Charter**.

[9] On this appeal the appellant disagrees with the trial judge's conclusion that an analysis pursuant to s. 8 of the **Charter** fully disposes of the constitutional issues. He says that s. 487.052 offends **Charter** ss. 7 and 11(i).

Is s. 487.052 of the Criminal Code contrary to s.7 of the Charter and therefore of no force and effect pursuant to s. 52(1) of the Charter?

[10] In **R. v. Briggs**, **supra**, Weiler J.A., at paras. 8 through 17, thoroughly reviewed the background and operation of the DNA legislation which includes the **DNA Identification Act**, S.C. 1998, c. 37 (the "**DNA Act**") and s. 487 of the **Criminal Code** (see also **R. v. F.(S.)** (1997), 120 C.C.C. (3d) 260; O.J. No. 4116 (Q.L.) (Ont. Ct. (Gen. Div.)) at pages 271 to 275 (C.C.C.) per Hill, J.).

[11] Section 5 of the **DNA Act** establishes a DNA bank comprised of a "crime scene index" and a "convicted offenders index". The crime scene index is to contain DNA profiles from bodily substances that are found, generally, at any place where a "designated offence" was committed (**DNA Act**, s. 5(3)). The convicted offenders index will contain DNA profiles from those convicted of committing a "designated offence" where a court has, after conviction, ordered the offender to provide a bodily sample for analysis (**DNA Act**, s. 5(4)). When a "designated" offence is committed the police may forward any crime scene DNA to the bank for analysis and inclusion in the crime scene index. The resulting profile will be compared against the convicted offenders index. Section 6(1) of the **Act** prohibits disclosure of the actual DNA profile. Presumably then, if a match occurs the police will be notified only that there is a match and provided with the name of the convicted offender on record. The Crown may then apply for a DNA warrant to obtain bodily substances from the "suspect" revealed by the match. It thus appears that the offender DNA profile contained in the bank cannot be used as a basis for conviction. Only DNA obtained from the suspect through the warrant process may be used as evidence at the trial. The original match will do no more than provide the Crown with grounds to seek the DNA warrant. The DNA warrant and order provisions are available, not for all **Criminal Code** offences, but only for specific offences known as "designated offences". These are listed in Appendix A to this decision and are, generally, violent or sexual offences.

[12] Section 487.052 of the **Code**, which is challenged here, permits a court, on application by the Crown, to order the taking of a bodily sample, for DNA analysis, from a person who has been convicted of a "designated" offence. This section of the **Code** authorizes the ordering of the sample notwithstanding that the offence was committed prior to the coming into force of s. 5(1) of the **DNA Act** and s. 487.052 of the **Code**. Other sections authorize the ordering of samples for "current" crimes.

[13] Section 487.052 provides:

> 487.052 (1) Subject to section 487.053, if a person is convicted, discharged under section 730 or, in the case of a young person, found guilty under the *Young Offenders Act*, of a designated offence committed before the coming into force of subsection 5(1) of the DNA Identification Act, the court may, on application by the prosecutor, make an order in Form 5.04 authorizing the taking, from that person or young person, for the purpose of forensic DNA analysis, of any number of samples of one or more bodily substances that is reasonably required for that purpose, by means of the investigative procedures described in subsection 487.06(1), if the court is satisfied that it is in the best interests of the administration of justice to do so.
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> (2) In deciding whether to make the order, the court shall consider the criminal record of the person or young person, the nature of the offence and the circumstances surrounding its commission and the impact such an order would have on the person's or young person's privacy and security of the person and shall give reasons for its decision.

[14] It is the appellant's contention that s. 487.052 impermissibly infringes his liberty and security of the person interests. Section 7 of the **Charter** provides:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[15] It is important to understand the relationship between s. 7 and ss. 8 to 14 of the **Charter**. Sections 8 to 14 of the **Charter** are specific examples of the right to life, liberty and security of the person, protected under s. 7. In **Reference Re Section 94(2) of the Motor Vehicle Act**, [1985] 2 S.C.R. 486; S.C.J. No. 73 (Q.L.)(S.C.C.), Lamer, J., for the majority, explained the connection in this way (at p. 501 (S.C.R.)):

> In the framework of a purposive analysis, designed to ascertain the purpose of the s. 7 guarantee and "the interests it was meant to protect" (*R. v. Big M Drug Mart Ltd. [(1985*), 18 C.C.C. (3d) 385 (S.C.C.)]) it is clear to me that the interests which are meant to be protected by the words "and the right not to be deprived thereof except in accordance with the principles of fundamental justice" of s. 7 are the life, liberty and security of the person. The principles of fundamental justice, on the other hand, are not a protected interest, but rather a qualifier of the right not to be deprived of life, liberty and security of the person.

[16] And at p. 502 (S.C.R.):

> Sections 8 to 14, in other words, address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7. ...

[17] One of the difficult aspects of this appeal, in view of the relationship between **Charter** s. 7 and ss. 8 through 14, is determining what, if any, other alleged limitations remain to be considered under s. 7, it having been determined at trial that s. 487.052 does not offend s. 8.

[18] The purpose of s. 8 of the **Charter** is to protect individuals from unjustified state intrusions upon their privacy (**R. v. Golden,** [2001] S.C.J. No. 81 (Q.L.)(S.C.C.) per Iacobucci and Arbour, JJ. at para. 89) (see also **R. v. Dyment**, [1988] 2 S.C.R. 417; S.C.J. No. 82 (Q.L.)(S.C.C.) at paras. 16 to 26 and para. 38.) Privacy concerns include the sanctity of the body, the violation of which is an affront to human dignity (**R. v. Pohoretsky**, [1987] 1 S.C.R. 945; S.C.J. No. 26 (Q.L.)(S.C.C.)) and the non-consensual disclosure of personal information, which is also related to the dignity and integrity of the individual.

[19] The challenge here to s. 487.052 is narrow in scope. It is not the violation of the s. 8 privacy interest about which Mr. Murrins complains. He does not say, on this appeal, that the taking of the bodily sample pursuant to the order is an unreasonable search or seizure. The appellant says that the ordering of the bodily substance deprives him of his s. 7 right to liberty and security of the person.

[20] I have found two decisions of the Ontario Court of Appeal particularly helpful to my analysis: **R. v. Briggs**, **supra** and **R. v. F.(S.)** (2000), 141 C.C.C. (3d) 225; O.J. No. 60 (Q.L.)(Ont. C.A.).

[21] In **Briggs** the appellant pleaded guilty to three **Criminal Code** offences: robbery (s. 344), unlawful use of an imitation firearm (s. 85), and possession of stolen property (s. 355); for which he was sentenced to a total of 30 months imprisonment. As is the case here, the appellant was ordered, pursuant to s. 487.052 of the **Criminal Code**, to provide a bodily sample to be submitted to the national DNA bank. Mr. Briggs did not challenge the constitutionality of the

legislation. He argued, however, that in order to comply with s. 8 of the **Charter**, s. 487.052 must be read so as to require the judge, before ordering a sample, to find that there are reasonable and probable grounds to believe that the offender's DNA profile will be of future evidentiary value. The trial judge did not agree that this was a requirement of the section. That result was upheld on appeal, the court being of the opinion that subjective foresight that the offender was at specific risk to re-offend was not a pre-requisite for a DNA order and the failure to so require did not violate s. 8 of the **Charter**.

[22] In **R. v. F.(S.)**, **supra**, the appeal arose out of a constitutional challenge by the respondent, S.F., to ss. 487.05 to 487.07 of the **Code**. Those sections authorize a provincial court judge to issue a warrant to obtain bodily substances for DNA analysis in the context of an ongoing investigation of a designated offence. In **F.(S.)**, the Court of Appeal, reversing the trial judge in part, held that the warrant provisions did not violate s. 8 of the **Charter**.

[23] Although each of these cases included a brief reference to s. 7 of the **Charter**, the principal focus was the s. 8 analysis. In relation to s. 7, Finlayson, J.A. for the court in **F.(S.)**, said:

> [21] The approach taken by the respondent in challenging the impugned DNA warrant legislation under s. 7 as violative of the principle of self-incrimination is, I think, misconceived. In doing so, he has all but abandoned his attack on the legislation under s. 8. For my part, I do not think it necessary to decide whether or in what circumstances the principles of fundamental justice constitutionalize a wider or different protection than the protection afforded by s. 8 where the impugned legislation concerns the gathering of evidence. The determination of the issue in this case is governed by the following from the decision of the Supreme Court of Canada in *R. v. Mills*, [1999] S.C.J. No. 68 (Q.L.) [reported 139 C.C.C. (3d) 321, 180 D.L.R. (4th) 1], at para. 88:
>
> > Given that s. 8 protects a person's privacy by prohibiting unreasonable searches or seizures, and given that s. 8 addresses a particular application of the principles of fundamental justice, we can infer that a reasonable search or seizure is consistent with the principles of fundamental justice.
>
> [22] In my opinion, an analysis of this DNA warrant legislation under s. 8 is determinative of its constitutionality. If the legislation passes s. 8 scrutiny, it is a valid means of gathering evidence. As such, it can hardly be said to be contrary to the principles of fundamental justice under s. 7. Accordingly, our analysis of whether the legislation relating to DNA warrants is constitutional, begins and ends with s. 8. ...

[24] Although Finlayson, J.A. was speaking in the context of the warrant provisions of s. 487, his remarks are, in my view, instructive on the relationship between s. 8 and s. 7. If the DNA order procedure is found not to violate s. 8, as inferentially was the case in **Briggs**, **supra**, and as was held at trial, here, it is difficult to conceptualize how the same provisions fails to accord with the principles of fundamental justice under s. 7.

[25] In **Briggs** the court allowed that there might be residual concerns appropriate for review under s. 7. Weiler, J.A. wrote:

> [41] Interests in bodily integrity, personal autonomy and privacy are encompassed by the protections of life, liberty and security of the person guaranteed by s. 7 of the *Charter*: See *R. v. Stillman*, *supra*. In most respects, s. 7 will not add anything to the specific protections of s. 8: *R. v. Mills* (1999), 139 C.C.C. (3d) 321 (S.C.C.). There is, however, an important protection guaranteed uniquely by s. 7. This is the protection against legislation that is vague or over-broad: *Stillman, supra* at 345; *Mills, supra* at 368.

[26] Relying upon the above comments, the appellant says that the taking of a bodily sample without his consent will deprive him of his liberty and invade the security of his person. It is the appellant's submission that the forfeiture of these rights does not accord with the principles of fundamental justice. In particular, he says that the legislation is arbitrary in that it is unrelated to the state's interest in protecting the public through solving crime. The appellant says that the DNA legislation is over-broad because it is premised upon the incorrect assumption that the offender whose bodily sample is taken will re-offend. The designated offences, he says, are not ones where the general rate of recidivism is particularly high, nor is an offender who commits a designated offence necessarily at risk to re-offend.

[27] To establish a violation of s. 7 two conditions must be satisfied:

(1) the accused must be deprived of his right to life, liberty or security of the person by an order made pursuant to s. 487.052; and
(2) that deprivation must not be in accordance with the principles of fundamental justice.

Deprivation of liberty or security of the person:

[28] Relying upon the following comments of Cory, J. in **R. v. Stillman**, [1997] 1 S.C.R. 607; S.C.J. No. 34 (Q.L.)(S.C.C.), the appellant says that the non-consensual taking of a bodily sample for DNA testing results in a significant deprivation of his liberty or the security of his person:

> [42] . . . It has often been clearly and forcefully expressed that state interference with a person's bodily integrity is a breach of a person's privacy and an affront to human dignity. The invasive nature of body searches demands higher standards of justification. . .
>
> [51] The taking of the dental impressions, hair samples and buccal swabs from the accused also contravened the appellant's s. 7 *Charter* right to security of the person. The taking of the bodily samples was highly intrusive. It violated the sanctity of the body which is essential to the maintenance of human dignity. It was the ultimate invasion of the appellant's privacy. See *Pohoretsky, supra. In Dyment, supra*, at pp. 431-32, La Forest J. emphasized that "the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity". Quite simply, the taking of the samples without authorization violated the appellant's right to security of his person and contravened the principles of fundamental justice.
>
> (Emphasis added)

[29] To put the above comments in appropriate context it is important to appreciate the factual circumstances in **Stillman**. The 17 year old accused was arrested in 1991 for the brutal murder of a teenage girl. In response to the police request to take hair samples and teeth impressions, the accused's lawyers informed the police, and confirmed by letter, that he was not consenting to provide any bodily samples, including hair and teeth imprints, or to give any statements. Once the lawyers left, police officers took, under threat of force, scalp hair samples from the accused and he was made to pull some of his own pubic hair. Plasticine teeth impressions were also taken. A discarded tissue containing mucous was seized by the officer and used for DNA testing. The accused was subsequently released but was arrested again several months later. At that time, a dentist took new impressions of the accused's teeth, without his consent, in a procedure lasting two hours. More hair was taken from the accused, as well as a saliva sample and buccal swabs. The accused challenged the admissibility of the physical evidence, alleging that it constituted an unreasonable search and seizure. The Court discussed, at length, the common law power of search incidental to arrest and concluded that it did not include a search of this nature. Cory, J., writing for the majority, said in this regard:

> [42] . . . It has often been clearly and forcefully expressed that state interference with a person's bodily integrity is a breach of a person's privacy and an affront to human dignity. The invasive nature of body searches demands higher standards of justification. In *R. v. Pohoretsky*, [1987] 1 S.C.R. 945, at p. 949, Lamer J., as he then was, noted that, "a violation of the sanctity of a person's body is much more serious than that of his office or even of his home". In addition, La Forest J. observed in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 431-32, "the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity". Finally, in *R. v. Simmons*, [1988] 2 S.C.R. 495, at p. 517, Dickson C.J. stated:
>
> > The third and most highly intrusive type of search is that sometimes referred to as the body cavity search, in which customs officers have recourse to medical doctors, to X-rays, to emetics, and to other highly invasive means.
> >
> > Searches of the third or bodily cavity type may raise entirely different constitutional issues for it is obvious that the greater the intrusion, the greater must be the justification and the greater the degree of constitutional protection.
>
> [43] It is certainly significant that Parliament has recently amended the *Criminal Code*, through the addition of s. 487.05, so as to create a warrant procedure for the seizure of certain bodily substances for the purposes of DNA testing. This suggests that Parliament has recognized the intrusive nature of seizing bodily samples. The section requires that the police have reasonable and probable grounds, as well as authorization from a judicial officer, before they can make such seizures. If this type of invasive search and seizure came within the common law power of search incident to arrest, it would not have been necessary for the government to create a parallel procedure for the police to follow. In my view, it would be contrary to authority to say that this is no more than a codification of the common law.

[30] Cory, J.'s comments are clearly made in relation to an unauthorized search and seizure. Each of the cases to which he refers involves a search and seizure challenge. In **R. v. Pohoretsky**, **supra**, a physician, at the request of a police officer, had taken a blood sample from the appellant who was in an incoherent and delirious state. The doctor's action was permitted by the Manitoba **Blood Test Act**, S.M. 1980, c. 49, C.C.S.M., c. B63, when the doctor had reasonable and probable grounds for believing that the person had been drinking and driving within the preceding two hours. The Crown conceded that the taking of the appellant's blood was an unreasonable search contrary to s. 8 of the **Charter**. The sole issue before the Supreme Court was whether the admission of this evidence

would bring the administration of justice into disrepute. In allowing the appeal the Court held that the evidence should have been excluded under s. 24(1) of the **Charter**. In so doing, Lamer, C.J. commented at p. 949:

> . . . I consider this unreasonable search to be a very serious one. First, a violation of the sanctity of a person's body is much more serious than that of his office or even of his home. Secondly, it was wilful and deliberate, and there is no suggestion here that the police acted inadvertently or in good faith, . . . They took advantage of the appellant's unconsciousness to obtain evidence which they had no right to obtain from him without his consent had he been conscious. The effect of their conduct was to conscript the appellant against himself. ...
> (Emphasis added)

[31] In **R. v. Dyment**, **supra**, a doctor treating the appellant in a hospital after a traffic accident collected a vial of free-flowing blood for medical purposes without the appellant's knowledge or consent. Upon the appellant explaining that he had consumed a beer and medication, the doctor turned the sample over to the police. The majority of the Supreme Court of Canada upheld the conclusion of the Prince Edward Island Court of Appeal that the search was an unreasonable one in violation of s. 8 of the **Charter** and agreed that the evidence should be excluded. The Court expressly declined to deal with any issues arising under s. 7 of the **Charter**.

[32] Finally, in **R. v. Simmons**, [1988] 2 S.C.R. 495; S.C.J. No. 86 (Q.L.) (S.C.C.) the appellant, upon entering Canada, was suspected of importing drugs and was strip searched by a customs official pursuant to authority granted in s. 143 of the **Customs Act**, R.S.C. 1970, c. C-40, ss. 143, 144. It was held that ss. 143 and 144 of the **Customs Act** do not infringe the right to be secure against unreasonable search and seizure enshrined in s. 8 of the **Charter**. The Court noted that the degree of personal privacy reasonably expected at customs is lower than in most other situations. Travellers seeking to cross national boundaries expect to be subject to a screening process. Physical searches of luggage and of the person are accepted aspects of the search process where there are grounds for suspecting that a person has made a false declaration and is transporting prohibited goods. The searches are conducted in private rooms by officers of the same sex. In these conditions, requiring a person to remove pieces of clothing until such time as the presence or absence of concealed goods can be ascertained is not so highly invasive of an individual's bodily integrity to be considered unreasonable under s. 8 of the **Charter**. The comments of Dickson, C.J., quoted by Cory, J. in **Stillman**, above, were made in the context of his description of the three types of customs

searches: (1) routine questioning; (2) a strip or skin search; and (3) a body cavity search, in which customs officers have recourse to medical doctors, to X-rays, to emetics, and to other highly invasive means. It is clear that, in commenting as he did, Dickson, C.J. was focussing upon the extent of the physical intrusion in the context of the privacy interest protected by s. 8.

[33] Here we are not dealing with a gathering of information that is said to be an unreasonable search or seizure or otherwise violate Mr. Murrins' privacy interest. The alleged s. 7 violation is limited to the physical intrusion and inconvenience involved in taking the sample. Accordingly, it is important to consider the extent of the physical interference. Section s. 487.06(1) provides:

> s. 487.06(1) A peace officer or another person under the direction of a peace officer is authorized to take samples of bodily substances from a person by a warrant under section 487.05 or an order under section 487.051 or 487.052 or an authorization under section 487.055, by any of the following means:
>
> (a) the plucking of individual hairs from the person, including the root sheath;
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> (b) the taking of buccal swabs by swabbing the lips, tongue and inside cheeks of the mouth to collect epithelial cells; or
>
> (c) the taking of blood by pricking the skin surface with a sterile lancet.

[34] In **R. v. F.(S.)**, **supra** (at trial), Hill, J. described the procedure involved:

> The court received uncontradicted evidence from Dr. James Young, the Chief Coroner of Ontario, regarding the circumstances of the seizure of blood, hair and epithelial cells from suspects.
>
> A capillary blood sample is obtained by first cleansing the area to be tested using alcohol and then pricking the skin surface with a small sharp sterile lancet. Only a few drops of blood are obtained for sampling. Bleeding at the site stops spontaneously or subsides when a small amount of pressure is applied over the site of the puncture. Such pressure needs to be applied for only a couple of minutes in order to stop bleeding. Such samples can be taken from a number of areas of the body but most commonly are taken from a finger or the earlobe.

. . .

> Dr. Young further deposed that the procedure for hair sample seizures is medically very simple. Individual hairs are plucked. The procedure takes only a few minutes and results in "very minimal discomfort to the person". Dr. Young stated that there appear to be no medical risks associated with this procedure. For the procedure to provide the necessary DNA, the root sheath must be part of a plucked hair. Accordingly, the person plucking the hair must find firmly rooted hair and gather a sufficient sample. This procedure is frequently done by dermatologists who specialize in hair transplantation procedures. As well, this testing is done as part of mineral testing in patients. Provided the same hair is not plucked too frequently, the hair regrows. Therefore, there is no permanent loss of hair by the taking of a sample.
>
> As to the seizure of epithelial cells, Dr. Young's evidence was that there are a number of ways of obtaining a sample using the buccal smear technique in the mouth cavity, all of which appear to have no medical risks associated with them. Most DNA materials are usually obtained after rinsing the mouth by running a sterile Q-tip over the inside of the cheek in order to obtain cells. The skin is not broken in order to obtain the sample and no bleeding occurs. Since the cheek is extremely expandable, applying some pressure to this area does not cause discomfort.

[35] I am not persuaded that the ordering of a bodily sample pursuant to s. 487.052, which was found at trial not to be an unreasonable search or seizure under s. 8 of the **Charter**, **supra**, results in a violation of a person's liberty and security rights under s. 7. The taking of the sample is a seizure. Its essential characteristic is the gathering of information about the person. That intrusion, in this context, is fully encompassed within the s. 8 analysis which is directed at protecting a person from a search or a seizure which is unreasonable. In **R. v. Dyment**, **supra**, per La Forest, J. at p. 430:

> In this case, unlike *Pohoretsky*, where this was conceded, there was no search. The doctor simply collected the blood as it flowed from an open wound and it was later handed over by him to the police officer. It should be observed, however, that s. 8 of the *Charter* does not protect only against searches, or against seizures made in connection with searches. It protects against searches or seizures. As Errico Co. Ct. J. put it in *Milton v. The Queen* (1985), 16 C.R.R. 215, at p. 226: "The words are used disjunctively and although in instances it is a search and seizure that will be under scrutiny as was the situation in *Southam*, the Charter is worded so that a seizure *simpliciter* could offend against the section." See also *R. v. Dzagic* (1985), 16 C.R.R. 310 (Ont. H.C.), at p. 319. which is unreasonable.
> (Emphasis added)

[36] Any physical intrusion and inconvenience caused by the taking of the sample is part of the seizure. It follows, therefore, that the analysis of the reasonableness of the seizure includes the manner in which it was carried out which, of course, extends to any physical intrusion and inconvenience which results from it. No interference with life, liberty or security of the person apart from the physical intrusion and inconvenience has been identified or relied upon by the appellant. I emphasize that it is conceded for the purpose of this appeal that s. 8 is not infringed. It is my view, that no limitation of the appellant's liberty or security of the person rights has been identified or relied upon other than those which have been found not to limit his s. 8 rights. I think that this is the point made by Finlayson, J.A. in **R. v. F.(S.)**, **supra**, at § 23 above, although in relation to DNA warrants.

[37] To put this challenge in appropriate context, it is helpful to compare the alleged deprivation of Mr. Murrins' liberty or security of the person interest with the s. 7 interference occurring in **R. v. Morgantaler**, [1988] 1 S.C.R. 30; S.C.J. No. 1(Q.L.)(S.C.C.) and in **Rodriquez v. British Columbia (Attorney General)**, [1993] 3 S.C.R. 519; S.C.J. No. 94 (Q.L.)(S.C.C.). In the former, the abortion law forced a woman to carry an unwanted pregnancy to term. In the latter, the law against assisted suicide resulted in persons, who were unable to take their own lives, existing until death with a progressively debilitating disease.

[38] In forming my view that the effect upon the liberty and security of the person interests here is trivial, I have taken into account the context in which those interests are claimed. It has been recognized that the circumstances of the person claiming the violation must be considered in defining the parameters of a **Charter** right. In **R. v. R.J.S.**, [1995] 1 S.C.R. 451; S.C.J. No. 10 (Q.L.)(S.C.C.) at para. 97, the Court commented that the boundaries of the right to liberty were affected by the context in which the right was asserted. When evaluating a potential violation of the right to privacy, in **Briggs**, **supra**, Weiler, J.A. looked at the circumstances of the complainant:

> [33] The second exception to the reasonable and probable grounds standard mentioned by Dickson J. in *Hunter v. Southam, supra*, is when an individual's bodily integrity is affected. The extent to which state intrusion with bodily integrity will be tolerated under the *Charter* is linked to the reasonable expectation of privacy that an individual has. There is a significant difference in the reasonable expectation of privacy and, hence, the protection from interference with bodily integrity afforded to a person who is a suspect but has not been charged, a person who has been arrested and charged, a person who has been convicted, and a person who is subject to a custodial sentence. See *Beare, supra*,

> at 77; *Conway v. A.G. (Canada)* (1993), 83 C.C.C. (3d) 1 (S.C.C.) at 4 *sub. nom. Weatherall v. Canada (Attorney General)*. In *Stillman, supra*, at pp. 342-43, the Court held that the taking of DNA samples was state interference with the accused's bodily integrity, a breach of his privacy and an affront to human dignity. At the time that the samples of DNA were obtained, Stillman had not been convicted of a crime and it is in that context that the court's comments must be considered. The Court held that a higher justification for state interference was necessary than the common law power of search incident to arrest and mentioned the new legislative provisions respecting DNA search warrants. A person who has been convicted of a designated offence, unlike an accused person, no longer has the benefit of the presumption of innocence. Persons convicted of serious crimes may be subject to sentences of incarceration in prison or in jail. Such persons are subjected to strip searches, body cavity searches and constant supervision. An offender serving a sentence in the community is also subject to supervision and the imposition of terms and conditions limiting the conduct of the offender's life.
>
> [34] Human dignity is closely aligned with an individual's freedom of choice. A person convicted of a crime has a lesser expectation of privacy not because that person's worth as a human being is less, but because the person's right to make choices about his or her life is curtailed.
> (Emphasis added)

[39] Although Weiler, J.A. was addressing the privacy interest, her remarks are equally applicable to the appellant's claim to security of the person and liberty interests.

[40] An order for a bodily sample can only be made after the accused has been convicted of a "designated" offence. Once the informational component revealed by the seizure is separated, as properly part of a s. 8 analysis, the physical inconvenience under s. 7 is, in my view, a minor intrusion for a person in Mr. Murrins' circumstances.

[41] A person convicted of a designated offence would reasonably expect the authorities to gather and retain identifying information, such as fingerprints, distinctive body markings, or eye color. The bodily sample here is simply another form of identification. The manner of collection need be no more intrusive nor disruptive than that involved in attendance for fingerprinting. (See discussion of **R. v. Beare; R. v. Higgins**, [1988] 2 S.C.R. 387; S.C.J. No. 92 (Q.L.)(S.C.C.) at 401 - 402 (S.C.R.) **infra** at § 72). The DNA legislation carries with it the additional requirement for court authorization of the sample taking and court direction of the manner in which that occurs. I again emphasize that the appellant is not complaining about the potential infringement of his privacy arising from the

personal information which a DNA sample has potential to disclose. Accordingly, it is my view that there is no violation of liberty or security of the person in the context argued here. There being no violation it is unnecessary to determine whether the ordering of the sample accords with the principles of fundamental justice.

[42] While it is my view that the extent of the interference with the s. 7 interest here is trivial and does not fall within the ambit of the protection afforded by that section, in **F.(S.)** (at trial), Hill, J. accepted that the taking of a bodily sample does interfere with the security of the person and the individual's liberty interest. He said (at p. 303):

> As a threshold issue, the applicant established to the court's satisfaction that the DNA warrant provisions constitute an interference with the right to security of the person and the right to liberty.
>
> It is evident from a reading of the statement of Cory J. in *Stillman v. The Queen, supra* at 345 that the taking of bodily substances by the government, other than on consent, implicates security of the person . . .
>
> . . .
>
> Detention, transport, the threat or use of force, the extraction of a bodily substance and, informational disclosure through its testing constitute impairment or deprivation of one's security of the person.
>
> In addition, the DNA warrant regime involves a deprivation of the liberty of the person. The suspect's liberty is assailed at the scene of testing. The results of testing, where used as incriminating evidence in a criminal trial, are tied to the prospect of conviction with consequential stigma and the threat of punishment or its actual imposition.

[43] Although I am not satisfied that the legislation results in a deprivation of liberty or the security of the person within the meaning of s. 7 of the **Charter**, I will assume, for the purpose of further analysis, that it does.

> **Is the deprivation made in accordance with the principles of fundamental justice?**

[44] It is the appellant's submission that the DNA legislation is "arbitrary and unfair" in that it is overly broad. He says that the ordering of a bodily sample does not advance the state's interests. This is so, he says, because the taking of the DNA sample is predicated upon a conviction for a "designated offence" rather than upon an individualized assessment of recidivism.

[45] In order to provide an evidentiary base for this argument at trial, the appellant called Dr. Philip Klassen. Dr. Klassen was qualified, on consent, as "a forensic psychiatrist, capable of providing expert opinion in the area of criminal recidivism and risk assessment thereof". In addition to his *vive voce* evidence, two written reports from Dr. Klassen were filed.

[46] It was his evidence that risk assessment tools have now been developed which substantially outperform clinical judgment in predicting recidivism. These tools consist of checklists, tailored by type of offence. The checklists contain many variables relating to the offender's lifestyle and interpersonal relationships. Generally, each variable is assigned a value representing the extent to which this offender exhibits a particular behaviour or trait. The risk assessment is derived from a quantitative evaluation of the "risk factors". The weight which is assigned to each variable is based upon self-reporting in combination with historical information and institutional records. One such tool, called the "Violence Risk Appraisal Guide", for example, includes a total of twelve factors, such as elementary school maladjustment; history of alcohol problems; marital status; criminal history; compliance with prior release conditions; age; mental illness; gender of the victim; and extent of injury to the victim.

[47] It was Dr. Klassen's evidence that the fact that an offender has committed a particular kind of offence, here, a "designated offence" by itself does not meet the "current standard" as predictive of recidivism.

[48] Dr. Klassen testified that clinical assessments have tended to substantially over-predict the risk of re-offending. He acknowledged, however, that data on whether an offender has, in fact, re-offended is based upon a conviction for a subsequent offence or, sometimes, upon re-arrest and conviction. Accordingly, the data understates the actual rate of re-offending since it does not include unsolved crimes. He acknowledged, as well, that prior violent or sexual offending behaviour does correlate with risk of future violent or sex offender recidivism.

[49] In a report letter dated September 7, 2000, he expressed his opinion that "it is unlikely that acceptable levels of predictive accuracy could be obtained by virtue

of using ... the criminal record of the offender, the nature of the offence, and the circumstances surrounding its commission, alone". These are the statutory criteria which s. 487.052(2) directs a judge to consider before granting an order. In a subsequent report Dr. Klassen stated that there is no official data as regards rates of recidivism for specific offences as a result of which there is "little or no" information on the rates of recidivism for the "designated offences".

[50] On cross-examination Dr. Klassen acknowledged that he has not reviewed any literature from countries which now have DNA banks on the successes they have had in solving crime with their DNA data. He acknowledged, as well, that there is a substantial risk, if not a likelihood, that an individual convicted of one criminal offence, of any kind, will be convicted of another criminal offence. He agreed that the "rate of recidivism" data was dependent upon the reporting period for which it was kept and whether the offender was apprehended. He acknowledged that the actual burden of recidivism on society is greater than that reflected in re-offence rates. This is due, in part, to the fact that some offences such as murder are significantly more likely than others, such as sexual assault, to result in conviction. The actual rate of sexual assault is about twenty-five times higher than the conviction rate. He acknowledged that there is a significant disconnect between certain offences committed and the convictions resulting therefrom. He agreed that the extent of an offender's criminal record, the time in his life when the offending started, parole violations, prior violent arrests, prior incarceration, alcohol involvement and, to a lesser extent, drug involvement are factors used in evaluating recidivism. Other relevant factors, to a lesser or greater extent, include employment, marital status, criminal associations, and age. Intensity, variability and versatility in offending are relevant to a clinical assessment of recidivism but not used as risk assessment tools. He agreed that even some "low risk" offenders re-offend.

[51] Fundamental to the appellant's argument is the premise that to be constitutional, the DNA order must be based upon an individual assessment of recidivism. The legislation is arbitrary, he says, in its failure to require that assessment. Arbitrariness is related to the connectedness of the means to the purpose of the legislation.

[52] A similar argument was considered by Weiler, J.A. in **Briggs** in the context of the alleged intrusion into the appellant's privacy. It was the submission on appeal in **Briggs**, that the ordering of a DNA sample, not predicated upon reasonable and probable grounds that the convicted offender will re-offend, would violate s. 8 of the **Charter**. In my view, Mr. Murrins' argument here is the same as

that made in **Briggs**. He says that to conform with s. 7 of the **Charter**, s. 487.052 must be based upon an individualized risk assessment, failing which, the legislation is overly-broad.

[53] In **R. v. Nova Scotia Pharmaceutical Society**, [1992] 2 S.C.R. 606; S.C.J. No. 67 (Q.L.)(S.C.C.) the Court explained that overbreadth, whether it stems from the vagueness of a law or from another source, is an analytical tool employed to establish a violation of a **Charter** right. The alleged violation is balanced against state objectives. Gonthier, J., writing for the Court, said at p. 630:

> In all these cases, however, overbreadth remains no more than an analytical tool. The alleged overbreadth is always related to some limitation under the *Charter*. It is always established by comparing the ambit of the provision touching upon a protected right with such concepts as the objectives of the State, the principles of fundamental justice, the proportionality of punishment or the reasonableness of searches and seizures, to name a few. There is no such thing as overbreadth in the abstract. Overbreadth has no autonomous value under the *Charter*. . . .

[54] The concept of overbreadth was explained, as well, in **R. v. Heywood**, [1994] 3 S.C.R. 761; S.C.J. No. 101 (Q.L.)(S.C.C.), per Cory, J. at p. 792 - 793:

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.
>
> Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the State interest against that of the individual. . . .
>
> In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms with the *Charter*, legislatures must have the power to make policy choices. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator. It is

> true that s. 7 of the *Charter* has a wide scope. This was stressed by Lamer J. (as he then was) in *Re B.C. Motor Vehicles Act, supra*, at p. 502. There he observed:
>
> > Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice.
>
> However, before it can be found that an enactment is so broad that it infringes s. 7 of the Charter, it must be clear that the legislation infringes life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective.
> (Emphasis added)

[55] Citing **Heywood**, Mr. Murrins complains that the legislation is "overbroad" in that the means are "too sweeping in relation to the objective" (**Heywood** at p. 792 per McLachlin, J. (as she then was)).

[56] A first step in assessing overbreadth is determining the purpose of the legislation under attack. As stated in § 12, above, s. 487.052 is part of a package of legislative initiatives which include the **DNA Act** and the related provisions of the **Code** (s. 487). The broad purpose of the **DNA Act** is:

> 3. . . to establish a national DNA data bank to help law enforcement agencies identify persons alleged to have committed designated offences, including those committed before the coming into force of this Act.

[57] As explained above, convicted offender DNA is collected in the databank, upon application by the Crown and where authorized by a court order. In considering the purpose of the full legislative scheme and that of s. 487.052, Weiler, J.A. said in **Briggs**, **supra**:

> [22] In this case, the state's interest is not simply one of law enforcement *vis-à-vis* an individual — it has a much broader purpose. The DNA data bank will: (1) deter potential repeat offenders; (2) promote the safety of the community; (3) detect when a serial offender is at work; (4) assist in solving cold crimes; (5) streamline investigations; and most importantly, (6) assist the innocent by early exclusion from investigative suspicion (or in exonerating those who have been wrongfully convicted).
>
> [23] The appellant's submission assumes that there is only one context or purpose for obtaining a DNA order, the likelihood that an offender has committed or will

> commit an offence in the future and that a sample of his DNA will afford evidence of commission of that crime. Acceptance of the appellant's submission would negate other broader purposes of the legislation, such as deterring an offender from committing crimes in the future. ...

[58] In **R. v. B. (S.A.)** (2001), 157 C.C.C. (3d) 510; A.J. No. 1202 (Q.L.) (Alta.C.A.), Russell, J.A., writing for the majority, considered the purpose of this legislation in the context of the granting of warrants to seize DNA at the investigatory stage. She said:

> [17] It appears from these debates that the purposes of these provisions are to (1) create specific authority for obtaining DNA samples for genetic analysis; (2) clarify the circumstances in which such samples may be taken; (3) prescribe a uniform procedure for seizure, use and disposal of samples; (4) provide the foregoing for purposes of either inculpation or exoneration; and (5) enhance the criminal justice system, through greater clarity and certainty as to the availability of DNA testing.
>
> [18] These purposes are also reflected in a reading of the provisions as a whole. They mandate a unique warrant application procedure and circumscribe the conditions in which such a warrant may be given. They prescribe a strict process for execution of the warrant addressing detention of the individual, advice and information to be provided to that person, obtaining of the sample, use to which the sample may be put, and destruction of the sample and testing results. As they create an investigative tool that is available to the police in appropriate circumstances, these provisions provide for the obtaining of evidence that may be either inculpatory or exculpatory.
>
> [19] These are valid purposes of sufficient importance to warrant court authorized intrusion upon bodily integrity. The elaboration of a fair and effective criminal justice system is a legitimate parliamentary concern. In recent years, DNA testing has become a valuable tool for the investigation of crime while its availability has not been clearly defined. Attempting to enhance the effectiveness of the justice system by providing clarification and uniformity in this area is a constitutionally sufficient purpose. The trial judge correctly reached the same conclusion.

[59] In my view these comments upon the purpose of the legislation are equally relevant to the DNA order provisions under scrutiny here.

[60] The appellant says that the purpose of the DNA provisions is to “provide a new and additional tool to assist law enforcement agencies in identifying persons

alleged or suspected to have committed certain offences, namely, designated offences as defined in s. 487.04 of the **Criminal Code**. This purpose reflects the state's interest in having crimes investigated and solved expeditiously." Mr. Murrins says that the exposure of all those persons who have committed a designated offence to the risk that a bodily sample may be ordered, casts the net too broadly.

[61] Fundamental to this s. 7 challenge is the appellant's theory that only an individualized risk assessment for each convicted offender will ensure that the proper group of offenders is subject to the potential deprivation of the liberty and security interest. That group, he says, are those offenders who are "likely" to re-offend. He does not specify an acceptable level of likelihood, or quantify what risk of re-offence would suffice for inclusion.

[62] A DNA order does not automatically follow conviction for a designated offence. Before the order is granted, the Crown must make application to a judge who must be satisfied that it is in the best interests of the administration of justice to do so. Section 487.052(2) requires that the judge give reasons for the decision and the judge is directed to consider several factors including, but not limited to:

1. The criminal record of the offender;

2. The nature of the offence;

3. The circumstances of the offence; and

4. The impact of the order on the offender's privacy interest.

[63] The appellant says that it is clear from Dr. Klassen's evidence that these factors are unhelpful in predicting an offender's risk of re-offending. I disagree. That was not the thrust of Dr. Klassen's evidence. He testified that he could not provide a meaningful estimate of the risk of re-offending using those criteria alone.

[64] Two crucial facts revealed by Dr. Klassen's evidence are ignored in the appellant's argument: (1) there is a substantial risk, if not a likelihood, that an individual convicted of one criminal offence will be convicted of another criminal offence; and, (2) prior violent or sexual offending behaviour does correlate with risk of future violent or sex offender recidivism.

[65] The factors which must be and those which may be considered by the judge before ordering a discretionary DNA sample have the potential to bring into play aspects of an individualized risk assessment. In a recent decision of this court, **R. v. Jordan**, 2002 NSCA 11, as yet unreported, Cromwell J.A., writing for the court, commencing at §60, reviewed the relevance of the factors enumerated in s. 487.52(2) to the balancing of the individual's interests against those of the state. I agree with and would adopt his analysis in that regard. Accordingly, although it is my view that an individualized risk assessment is not a prerequisite to a constitutional DNA order, I do not agree with the appellant that such an order is inevitably unrelated to the particular offender's risk of re-offending.

[66] When investigating current crimes the police logically consider prior offenders as suspects. This is intuitive and unrelated to a formal risk assessment. The use of crime scene DNA matching to eliminate a suspect is an important tool for streamlining investigations by redirecting police effort. It will help ensure that police do not waste scarce law enforcement resources in pursuing the wrong suspect. Obviously, identification of an offender through DNA is of even greater assistance. The test of overbreadth is whether the provision which permits an order for a bodily sample for DNA testing from a convicted offender does "little or nothing" to advance the purpose of the legislation **(**see, for example, **Rodriquez**, **supra** at §147). I do not agree with the appellant's submission that s. 487.052 does "little or nothing to advance the state's interest" in solving crimes.

[67] The appellant says that an aspect of his overbreadth claim is the fact that a "designated offence" could include conduct which, although criminal, is relatively minor. In my view, the direction to the court, under s. 487.052(2), to consider the circumstances of the offence before granting the order enables the judge to decline to order a bodily sample from an offender who has committed the offence in a less egregious way, absent other factors which militate in favour of an order.

[68] Any deprivation of the liberty or security of the person interest, must be weighed against the state's interest in solving and preventing crime. As I have already said, the bodily intrusion occasioned by the taking of the sample is a minimal one here. Accordingly, there need not be a strong balance in favour of the state.

[69] Some guidance for this balancing analysis can be found in **R. v. Beare**, **supra**. There a similar challenge was made to legislation which permitted fingerprinting. Mr. Beare, who was charged with a criminal offence, was served with an appearance notice and a summons requiring attendance at R.C.M.P. offices

to be fingerprinted under the **Identification of Criminals Act**, R.S.C. 1985, c. I-1, s. 2. Section 2 of that **Act** provided for the fingerprinting of a person in lawful custody and ss. 453.3(3) and 455.5(5) of the **Criminal Code** required an appearance and deemed a person so appearing to be in lawful custody charged with an indictable offence. Mr. Beare did not attend at the R.C.M.P. offices as required. On a motion, he unsuccessfully challenged the requirement that an appearance be made for fingerprinting following charge but before conviction. The appeal was allowed. On further appeal to the Supreme Court of Canada the constitutional questions before the Court queried whether or not s. 2 of the **Identification of Criminals Act** and ss. 453.3(3) or s. 455.5(5) of the **Criminal Code**, to the extent that they provided for the fingerprinting of a person charged with but not convicted of an indictable offence, infringed, among other sections, s. 7 of the **Charter**, and if so, whether or not such infringement was justified by s.1.

[70] Section 2 of the **Identification of Criminals Act** provides that anyone who is charged with committing an indictable offence "may be fingerprinted or photographed or subjected to such other measurements, processes and operations having the object of identifying persons as are approved by order of the Governor in Council". The related regulation approves the identification processes of fingerprinting, palmprinting and photography.

[71] It is important to note that in **Beare** the Crown conceded that "[t]he impugned provisions infringe the rights guaranteed by s. 7 because they require a person to appear at a specific time and place and oblige that person to go through an identification process on pain of imprisonment for failure to comply."

[72] In reviewing the authorized identification procedures and the rationale therefor, La Forest, J., writing for the Court, observed (at para. 33) that as an incident of arrest identifying features are routinely noted. These would include height, weight and natural or artificial marks on the body, such as birth marks or tattoo marks. As to the rationale, he said at p. 404:

> These procedures have been permitted because of the felt need in the community to arm the police with adequate and reasonable powers for the investigation of crime. Should fingerprinting be assimilated to these procedures? Many considerations, we saw, argue for that position. Promptitude and facility in the identification and the discovery of indicia of guilt or innocence are of great importance in criminal investigations. This, along with its certitude, which is critical to the criminal justice system, has resulted in the general use of fingerprinting by police forces throughout the world. What really requires

> determination is whether in the circumstances the process unduly invades the rights of the accused.
> (Emphasis added)

[73] LaForest, J. urged a practical approach to the issue before him:

> In examining this question one must have a sense of proportion. Is the taking of fingerprints any more serious an invasion of the right of a person in custody than examining the person's body for birthmarks and the like? I do not think so and, as I noted, being arrested and charged for an offence seems to me to be more serious. As Augustus Hand J. stated in *United States v. Kelly*, 55 F.2d 67 (2nd Cir. 1932), at p. 70:
>
> > It is no more humiliating than other means of identification that have been universally held to infringe neither constitutional nor common-law rights. Finger printing is used in numerous branches of business and of civil service, and is not in itself a badge of crime. As a physical invasion it amounts to almost nothing, and as a humiliation it can never amount to as much as that caused by the publicity attending a sensational indictment to which innocent men may have to submit.

[74] He dismissed arguments that fingerprinting was particularly intrusive and demeaning, noting that the stigma of being charged with an offence, in view of the grave social and personal consequences arising therefrom, far outweighed the indignity of fingerprinting.

[75] He then considered Mr. Beare's submission that the fingerprinting provisions violated the principles of fundamental justice because they operated in an arbitrary manner.

[76] In conducting that analysis the Court considered the purposes of the legislation and the relationship of fingerprinting to effecting those purposes. In my view his comments are relevant, by analogy, to the DNA identification process (at p. 408):

> I begin by referring to what has already been said regarding the purposes of the legislation and the many uses to which fingerprinting has been put in effecting those purposes. In brief, the main purposes of the *Identification of Criminals Act* and the allied provisions of the *Code*, as they apply to a person charged with but

> not convicted of an offence, are to establish the identity and criminal record of the accused, to discover whether there are warrants outstanding for his arrest or if he has escaped from lawful custody, and, in some cases, to gather evidence which may be relevant to the question of whether or not he committed the crime with which he has been charged.
>
> As already noted, it is appropriate and necessary for peace officers to check, confirm, or establish the identity of accused persons in a wide variety of situations. In urban areas, in particular, individuals are relatively anonymous. Virtually everywhere the population is very mobile. Peace officers themselves relocate and find themselves working in new communities, and thus may fail to recognize even long-time residents. In this social context, the fact that accused persons often try to conceal their true identity or criminal past, and sometimes jeopardize innocent persons in the process, will very frequently justify the imposition of a requirement to submit to fingerprinting. That is what the impugned legislation seeks to do.

[77] He noted that the fingerprinting provisions operate only with respect to indictable offences, which he called the "most serious category of criminal offences"; that the **Identification of Criminals Act** limits identification processes to (1) those which are sanctioned by the Governor in Council; and (2) those processes which are "universally accepted as reliable and efficient and as minimally intrusive upon the individual" (at p. 409).

[78] In finding the sections unconstitutional, in **Beare**, the Court of Appeal was concerned that the sections were arbitrary in that they permitted, but did not require, fingerprinting, leaving the police with a discretion whether to take the fingerprints of the accused. It was the Court of Appeal's view that this deficiency could be rectified by requiring the police to demonstrate reasonable and probable grounds for believing fingerprinting is necessary.

[79] LaForest J. rejected that proposition saying at p. 410:

> The trouble with this approach, in my respectful view, is that it fails to keep in mind the numerous and varied functions of fingerprints, and that they may be useful in almost any case. It could seriously impede criminal investigations to impose rigid guidelines and place upon the courts the burden of determining on second-hand knowledge that fingerprinting does not meet any of the important purposes for which it might legitimately be used.

> The existence of the discretion conferred by the statutory provisions does not, in my view, offend principles of fundamental justice. Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. . . .

[80] The Court expressly rejected Mr. Beare's submission that before fingerprinting, in addition to having reasonable and probable grounds for believing the accused had committed an offence, the peace officer must also have reasonable and probable grounds for believing that fingerprinting would likely provide evidence relating to the offences, or reasonably doubted the identity of the accused, or believed on reasonable and probable grounds that fingerprinting would provide evidence of the subject's identity.

[81] To impose such requirements, said the Court, "could unduly limit police in the exercise of their duty to investigate crime." (at p. 412):

> . . . As the Court stated in *Lyons, supra,* at p. 362, s. 7 of the *Charter* guarantees fair procedures but it does not guarantee the most favourable procedures that can possibly be imagined. In my view, the requirements necessary to issue and confirm an appearance notice offer a sufficient safeguard to meet the requirements of fundamental justice for the taking of fingerprints.

[82] The Court allowed the appeal concluding that s. 2 of the **Identification of Criminals Act**, to the extent that it provides for fingerprinting of a person who has been charged but not convicted of an indictable offence, did not infringe the rights guaranteed by s. 7 of the **Charter**.

[83] I have detailed the arguments in **Beare**, because, in my view, the analysis is of assistance in evaluating the challenge here to the physical intrusion occasioned by the order for DNA identification. It is my view that the DNA scheme provides an even stronger case for approval.

[84] The "designated offences", as a group, represent the more "serious" **Criminal Code** crimes, as was noted by remarks of Hill, J. in **F. (S.)** at p. 283:

> ... The importance of the DNA warrant is reflected by the nature of the designated offences in respect of which the warrant may issue (s. 487.04 "designated offence"). These are serious, indictable offences mostly involving

> violence against the person and serious risk to public safety. Experience has shown that identity is frequently a central issue in these prosecutions. The legislative restraint inherent in circumscribing the type of criminal investigations in respect of which a DNA warrant may issue underlines both the pressing justification and a minimization of the use of this investigative device. This form of legislative restriction to serious offences has, on other occasions, proven to be a significant factor in the balancing process.

[85] The legislation limits the ordering of bodily samples to those offenders who have committed one of these serious crimes. This is one factor which weighs in favour of the state.

[86] Bodily samples pursuant to s. 487.052 are not taken unless ordered by a judge after a hearing. Before making an order the judge is required to consider the statutory criteria and may consider whatever additional factors are relevant in the circumstances. The judge must also direct the manner in which the sample is taken and must provide reasons for the order. The section directs the judge to consider the impact of the order upon the offender's privacy and security interests. There is a right of appeal. It is my view that these procedures adequately answer the appellant's submission that by "designating offences which may be the subject-matter of an order, the legislation casts the net too widely."

[87] It is important to note that the judge's discretion to order a DNA sample and, if ordered, in designating the manner of collection, must be exercised in a manner consistent with **Charter** values (see **Slaight Communications Inc. v. Davidson** [1989] 1 S.C.R. 1038 at §87). Accordingly, although the court has the power to order an arguably intrusive collection of DNA from an offender, for example, a pubic hair sample, such an order cannot be made if it would impact the offender's security of the person and liberty interests in violation of the **Charter**.

[88] The state interest in crime solution and prevention, which is advanced by better and more accurate identification of offenders, including the elimination of suspects, in my view, outweighs the intrusion upon the individual's liberty and security of the person interests occasioned by the taking of the sample.

[89] In **Jones v. Murray**, 962 F.2d 302 (4th Cir. 04/07/1992) [1992] CA4-QL 1075 the court considered a constitutional challenge to the requirement that convicted offenders submit a blood sample for DNA analysis. The offenders argued that it violated their Fourth Amendment rights to be secure against

unreasonable search and seizures in the absence of individualized suspicion. Neimeyer, J. for the court, in finding no violation, said:

> ¶ 21 Against the minor intrusion, therefore, we weigh the government's interest in preserving a permanent identification record of convicted felons for resolving past and future crimes. It is a well recognized aspect of criminal conduct that the perpetrator will take unusual steps to conceal not only his conduct, but also his identity. Disguises used while committing a crime may be supplemented or replaced by changed names, and even changed physical features. Traditional methods of identification by photographs, historical records, and fingerprints often prove inadequate. The DNA, however, is claimed to be unique to each individual and cannot, within current scientific knowledge, be altered. The individuality of the DNA provides a dramatic new tool for the law enforcement effort to match suspects and criminal conduct. Even a suspect with altered physical features cannot escape the match that his DNA might make with a sample contained in a DNA bank, or left at the scene of a crime within samples of blood, skin, semen or hair follicles. The governmental justification for this form of identification, therefore, relies on no argument different in kind from that traditionally advanced for taking fingerprints and photographs, but with additional force because of the potentially greater precision of DNA sampling and matching methods.

[90] I am mindful that in approving fingerprinting LaForest, J. noted that there is no penetration of the body and no removal of any substance from it (p. 413 S.C.R.). In that way fingerprints are distinct from DNA sampling. It is my view, however, taking into account the innocuous ways in which bodily samples can be retrieved and the fact that any retrieval is as directed by a judge and must conform to **Charter** values, it is a distinction without a material difference. The significant issue engaged by the ordering of a DNA sample is the invasion of the individual's security in the context of the use which may be made of the information, not the minor physical inconvenience of having the sample taken. The informational aspect is not in issue here.

[91] I would agree with the Crown's submission that it is important to keep what is happening here in context. While the potential invasion of privacy through the information revealed in DNA is substantially more serious than that disclosed on fingerprinting, it is not the privacy aspect of this matter that the appellant raises. He does not challenge Justice Weiler's analysis of this issue in **Briggs**, **supra**. There she reviewed the many protections of privacy afforded by the legislative scheme and concluded at para, 39:

> [39] . . . The convicted offender's DNA profile is tested in a way that does not reveal intimate details about the individual. . . . The privacy concern in the use to which information may be put is addressed in the legislation by the limitation as to the use of the information and by the penalties attached to misuse of DNA information. In addition, if an offender's conviction is quashed and a final acquittal is entered or a conditional or absolute discharge is obtained, the sample must be destroyed.

[92] It would be absurd to prevent law enforcement officials from taking advantage of markedly improved scientific techniques for identification. DNA analysis, properly conducted, carries with it far more certainty than does fingerprinting. Weighing the benefits to crime solution and prevention against the limited intrusion on the person, I am not persuaded that s. 487.052 is unconstitutional.

[93] I would find that s. 487.052 does not offend s. 7 of the **Charter** in that it does not deprive the appellant of the right to life, liberty or security of the person at all, or even if so, not in a way that is not in accordance with the principles of fundamental justice.

Is s. 487.052 of the Criminal Code contrary to s.11(i) of the Charter and therefore of no force or effect pursuant to Section 52(1) of the Charter?

[94] The appellant committed the offence on May 9, 1999. Section 487.052 came into force on June 30, 2000. He was sentenced on August 30, 2000. Section 487.052 applies to a designated offence committed before the coming into force of subsection 5(1) of the **DNA Act** (which timing coincided with the implementation of s.487.052). The appellant says that the provision for retrospective application violates s. 11(i) of the **Charter** which provides:

> 11. Any person charged with an offence has the right
>
> ...

> (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[95] The appellant says that an order directing a bodily sample is a part of the "punishment" for the offence. The implementation of s. 487.052 occurred after the commission of the offence, therefore, a DNA order cannot be made in relation to the appellant.

[96] It is my opinion that the ordering of a bodily sample for DNA testing is not "punishment" for the offence.

[97] What is meant by "punishment" in s. 11(i) of the **Charter**? The **Criminal Code** uses punishment and sentence interchangeably. In **R. v. McDonald** (1998), 127 C.C.C. (3d) 57; O.J. No. 2990 (Q.L.) (Ont.C.A.) the court explored the distinction between the terms (per Rosenberg, J.):

> [46] A distinction must be drawn between the terms sentence and punishment. The Canadian Sentencing Commission in its Report, *Sentencing Reform: A Canadian Approach* (Ottawa: Queen's Printer, February 1987) spent some time considering the meaning of the two terms and at p. 111 came up with this definition:
>
> > The word "sentence" comes from the Latin "*sententia*", which means opinion or the expression of an opinion. Therein lies one fundamental difference between a punishment and a sentence. The former is the actual infliction of a deprivation, whereas the latter is a *statement* ordering the imposition of a sanction and determining what it should be.
>
> [47] In its discussion of the two terms, the Commission further contrasted sentencing and punishment by defining the latter, at p. 109, as the "imposition of *severe* deprivation on a person found guilty of wrongdoing". The Commission left no doubt that it considered imprisonment to be a severe deprivation. Sentencing on the other hand is defined at p. 115 as the "judicial determination of a legal sanction to be imposed on a person found guilty of an offence".

[98] In other words, "punishment" means the range of sanctions available for a particular offence. "Sentence" is the sanction actually imposed by the court.

Throughout the **Criminal Code**, “punishment” is referred to as sanction for which one is “liable to be sentenced” (see, for example, s. 47 of the **Code**).

[99] The appellant characterizes the taking of the sample as coercive and punitive treatment and says that the potentially deterrent effect resulting from an order for a bodily sample brings it into the ambit of “punishment”. He says that both the physical taking of the DNA and the use to which it is put amounts to an additional price or disadvantage for the appellant on account of conviction.

[100] In **R. v. Lambert** (1994), 93 C.C.C. (3d) 88; N.J. 328 (Q.L.) (Nfld. C.A.) the court held that an order made under section 741.2, requiring the appellant to serve one-half of his sentence before parole eligibility, constituted a greater “punishment” and was, therefore, included within the scope of s. 11(i) of the **Charter**. In so deciding, the court considered the meaning of “punishment” (per Steele, J.A. at p. 93)

> Section 741.2 uses the term "sentence" without any reference to "punishment". In s. 11(i) of the Charter, however, Parliament selected the term "punishment" that appears in the phrases "*punishment* for the offence" and "benefit of the lesser *punishment*". I can only assume that in drafting s. 11(i) of the Charter, the term "*punishment*" was intentionally chosen.
>
> As I construe s. 11(i) of the Charter, "punishment" means or includes the formal sentence of the court (which is the punishment inflicted for the commission of the offence), but in addition, also means or includes any other "severe handling" or "harsh or injurious treatment". The term "punishment" appearing in s. 11(i) of the Charter is not confined to the narrow legal definition that corresponds exclusively to the formal sentence of the court. Punishment may also encompass any coercive or punitive treatment likely to discourage or deter an accused (and sometimes others) from a repetition of criminal activity.
>
> ¶ 20 The framers of the *Canadian Charter of Rights and Freedoms* knew or are presumed to have known that the Canadian *Criminal Code* authorizes a sentencing judge, in addition to imposing imprisonment or a fine, or both, to grant various orders or declarations that may qualify as a further punishment. Such orders may or may not be considered part of the formal sentence of the court, but they may comprise an integral part of the punishment levied by the sentencing judge. Section 199(3) "forfeiture"; s. 100(1) or (2) "firearms prohibition"; s. 259(1) or (2) "driving prohibition"; s. 725 "restitution to victim", and s. 737(1) "probation orders", and the like, all are examples of orders made at the time of sentencing that have the potential to be *additional punishment*. Whether such

> orders are or are not part of the formal sentence or deemed to be "punishment" within the anticipation of s. 11(i) of the Charter is another matter and one that will not be considered here. The only observation to be made is that many of the orders or declarations similar to those above are ancillary or secondary to the primary penalty of imprisonment or a fine. In our case, the order under s. 741.2 has the potential or implicit consequence of prolonging the period of incarceration and is, therefore, in a very real sense so closely coupled or linked to the primary penalty as to be a component of the punishment itself.
>
> (Emphasis added)

[101] The court may order that the offender serve one half of his sentence, "if satisfied . . . that the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires ...". (s. 743.6(1)). Section 743.6(2) of the **Code** explicitly sets out that "the paramount principles which are to guide the court under this section are denunciation and specific or general deterrence, with rehabilitation of the offender, in all cases, being subordinate to those paramount principles." Clearly, an order under s. 741.2 is intended as and results in additional punishment for the offence.

[102] While the court in **Briggs**, **supra**, and this court in **Jordan**, **supra**, acknowledged that an order for DNA testing can have deterrent effect, that is not the principal focus of the order. The deterrent effect arises, not from the act of taking the sample, but from the fact that the compilation of DNA information enhances the state's law enforcement capabilities. DNA typing is simply a means of identifying an offender, either to eliminate him from suspicion or identify him as a possible perpetrator. The fact that the existence of a DNA profile may deter offenders from committing future crimes is a residual benefit but does not bring the order into the category of a punishment. The order is in furtherance of the legitimate state interest in solving crime rather than its interest in sanctioning the offender.

[103] In **R. v. Wigglesworth**, [1987] 2 S.C.R. 541; S.C.J. No. 71 (Q.L.)(S.C.C.), the Court was called upon to decide whether s. 11(h) of the **Charter** (double jeopardy) was applicable to certain R.C.M.P disciplinary consequences so as to preclude a criminal trial for the same conduct for which the member had been internally disciplined. The Court rejected an analysis which was based upon the severity of the penalty associated with the conduct in favour of a test based upon whether consequences were truly penal in nature (per Wilson, J. for the majority, at p. 560 S.C.R.):

> This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s. 11, not because they are the classic kind of matters intended to fall within the section, but because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.. . .

[104] Justice Wilson makes those comments in the context of considering whether s. 11(h) applies to an internal disciplinary matter, however, some guidance can be drawn when assessing whether a (potential) consequence of conviction is, in fact, "punishment". Is the ordering of a blood sample "truly penal in nature"?

[105] In **R. v. Shubley**, [1990] 1 S.C.R. 3; S.C.J. No. 1 (Q.L.)(S.C.C.), in determining whether internal prison disciplinary proceedings engaged the double jeopardy section of the **Charter**, McLachlin, J. (as she then was), looked at the purpose of the proceeding. She noted that the purpose of the disciplinary proceedings was not "to mete out criminal punishment, but to maintain order in the prison." (para 37). By analogy here, the purpose of the DNA order is identification of the subject offender. That such identification may incidentally deter the offender from re-offending does not change the primary purpose of the order.

[106] In **Vanderlinden v. State**, 874 F. Supp. 1210 (D. Kan. 1995) the court held that a statute requiring the provision of DNA samples was not penal in nature. Similarly, it was the Court's view in **Briggs, supra**, that a DNA order "is not a punishment and should not be treated as one" (at para 71).

[107] I am not persuaded that the ordering of a DNA sample is "punishment" within the meaning of s. 11(i) of the **Charter**. Its impact on the offender is not comparable to the control central to imprisonment, house arrest or even reporting. It does not constitute a deprivation or hardship such as that which accompanies a restitution order, a fine or even a firearms prohibition. In no direct way does the order put limits upon the future behaviour of the offender. I do not agree that it

constitutes “severe handling” or “harsh treatment”. Nor is it a direct consequence of the conviction. The court cannot order a DNA sample on its own motion - there must be an application by the Crown. It is not within the range of tools from which the judge may craft the sentence.

Did the Learned Provincial Court Judge erred in law by failing to properly consider the mandatory criteria as outlined in Section 487.052 of the Criminal Code and ordering the taking of a bodily substance for the purpose of forensic DNA analysis?

[108] The judge did not give reasons in ordering that the appellant provide a bodily sample for DNA testing. The **Criminal Code** requires that he do so:

> 487.052(2) In deciding whether to make the order, the court shall consider the criminal record of the person or young person, the nature of the offence and the circumstances surrounding its commission and the impact such an order would have on the person's or young person's privacy and security of the person and shall give reasons for its decision.

[109] It is my view that in failing to comply with the statutory provision the judge erred at law. The Crown urges us to rectify this error through the application of s. 686(1)(b)(iii) of the **Criminal Code**, there being no substantial wrong or miscarriage of justice resulting from the error of law.

[110] In the absence of statutorily mandated reasons, I cannot conclude that there has been no substantial wrong or miscarriage of justice. To apply s. 686(1)(b)(iii), here, would completely remove the effect of the legislative requirement for reasons in s. 487.052(2) of the **Code**.

[111] This is not a circumstance requiring consideration of the jurisprudence on the adequacy of reasons nor the case law concerning the “requirement” for reasons.

Here, no reasons were provided. Nor is the judge's rationale discernable from his comments made during the hearing.

[112] We are therefore unable to say what criteria the judge considered in arriving at his decision, nor that he considered, at a minimum, the mandatory statutory criteria, as he is required to do.

[113] Accordingly, I accept the appellant's submission that the failure to provide reasons, here, constituted reversible error which requires a remedy. Where an appellate court finds reversible error disclosed by the reasons, generally it is appropriate that the court issue the order which should have followed the DNA hearing. Here, however, no reasons are provided. It is my view that in these unusual circumstances the matter should be remitted to the court of first instance for a new hearing on the merits. For clarity, the new hearing will be restricted to the propriety of an order in relation to Mr. Murrins and not encompass a renewed challenge to the constitutionality of the legislative provision.

DISPOSITION

[114] The appeal on the constitutionality of s. 487.052 is dismissed. I would set aside the order of Judge Randall and remit the Crown's application for a DNA order to the Provincial Court for hearing by another judge.

Bateman, J.A.

Concurred in:

Chipman, J.A.

Flinn, J.A.

Appendix A

Primary designated offences:

(i) section 151 (sexual interference),

(ii) section 152 (invitation to sexual touching),

(iii) section 153 (sexual exploitation),

(iv) section 155 (incest),

(v) subsection 212(4) (offence in relation to juvenile prostitution),

(vi) section 233 (infanticide),

(vii) section 235 (murder),

(viii) section 236 (manslaughter),

(ix) section 244 (causing bodily harm with intent),

(x) section 267 (assault with a weapon or causing bodily harm),

(xi) section 268 (aggravated assault),

(xii) section 269 (unlawfully causing bodily harm),

(xiii) section 271 (sexual assault),

(xiv) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm),

(xv) section 273 (aggravated sexual assault), and

(xvi) section 279 (kidnapping),

(b) an offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 4, 1983, namely,

(i) section 144 (rape),

(ii) section 146 (sexual intercourse with female under fourteen and between fourteen and sixteen), and

(iii) section 148 (sexual intercourse with feeble-minded, etc.),

(c) an offence under paragraph 153(1)(a) (sexual intercourse with step-daughter, etc.) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read from time to time before January 1, 1988, and

(d) an attempt to commit or, other than for the purposes of subsection 487.05(1), a conspiracy to commit an offence referred to in any of paragraphs (a) to (c);

Secondary designated offences:

(i) section 75 (piratical acts),

(ii) section 76 (hijacking),

(iii) section 77 (endangering safety of aircraft or airport),

(iv) section 78.1 (seizing control of ship or fixed platform),

(v) paragraph 81(1)(a) or (b) (using explosives),

(vi) subsection 160(3) (bestiality in the presence of or by child),

(vii) section 163.1 (child pornography),

(viii) section 170 (parent or guardian procuring sexual activity),

(ix) section 173 (indecent acts),

(x) section 220 (causing death by criminal negligence),

(xi) section 221 (causing bodily harm by criminal negligence),

(xii) subsection 249(3) (dangerous operation causing bodily harm),

(xiii) subsection 249(4) (dangerous operation causing death),

(xiv) section 252 (failure to stop at scene of accident),

(xv) subsection 255(2) (impaired driving causing bodily harm),

(xvi) subsection 255(3) (impaired driving causing death),

(xvii) section 266 (assault),

(xviii) section 269.1 (torture),

(xix) paragraph 270(1)(a) (assaulting a peace officer),

(xx) section 279.1 (hostage taking),

(xxi) section 344 (robbery),

(xxii) subsection 348(1) (breaking and entering with intent, committing offence or breaking out),

(xxiii) subsection 430(2) (mischief that causes actual danger to life),

(xxiv) section 433 (arson — disregard for human life), and

(xxv) section 434.1 (arson — own property),

(b) an offence under any of the following provisions of the *Criminal Code*, as they read from time to time before July 1, 1990, namely,

(i) section 433 (arson), and

(ii) section 434 (setting fire to other substance), and

(c) an attempt to commit or, other than for the purposes of subsection 487.05(1), a conspiracy to commit an offence referred to in paragraph (a) or (b);